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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE JUNIPER NETWORKS, INC.
SECURITIES LITIGATION

CASE NO. 5:06-CV-04327-JW

DEFENDANT ERNST & YOUNG LLP'S
OPPOSITION TO LEAD PLAINTIFF'S
MOTION FOR SANCTIONS

Before: Hon. Patricia V. Trumbull
Date: January 12, 2010
Time: 10:00 a.m.

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	2
III. ARGUMENT	6
A. Because EY Did Not Violate Any Discovery Orders, Fed. R. Civ. P. 37, And Cases Imposing Sanctions for Violations of Court Orders, Are Irrelevant	7
B. Issue Preclusion Sanctions Under the Court’s Inherent Authority Are Likewise Inappropriate	8
1. Plaintiffs Have Shown No Misconduct at All.....	9
2. Plaintiffs Have Suffered No Prejudice.....	10
3. The Availability of Less Drastic Sanctions Weighs Heavily Against Plaintiffs’ Motion	12
4. The Remaining Factors Weigh Against Sanctions	12
C. Plaintiffs’ Request For An Order Precluding EY From Asserting The Attorney-Client Privilege Or Work Product Protection Is Unwarranted.....	13
D. Plaintiffs’ Request For Further Relief Is Unwarranted And Unnecessary	14
E. Plaintiffs’ Insinuations of Spoliation Are Meritless	14
F. Plaintiffs’ Motion Should Be Denied Because They Did Not Meet And Confer.....	15
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

Page

CASES

1		
2		
3		
4	<i>Adriana Int'l Corp. v. Lewis & Co.,</i>	
5	913 F.2d 1406 (9th Cir. 1990)	7, 11
6	<i>Akiona v. United States,</i>	
7	938 F.2d 158 (9th Cir. 1991)	14
8	<i>Anheuser-Busch, Inc. v. Natural Beverage Distribs.,</i>	
9	69 F.3d 337 (9th Cir. 1995)	7, 8, 9, 11
10	<i>CFTC v. Noble Metals, Int'l,</i>	
11	67 F.3d 766 (9th Cir. 1995) <i>cert. denied</i> , 519 U.S. 815 (1996).....	7, 9
12	<i>Doe v. City of San Mateo,</i>	
13	No. C 07-05596 SI, 2009 WL 1636142 (N.D. Cal. June 8, 2009).....	15
14	<i>Fair Housing of Marin v. Combs,</i>	
15	285 F.3d 899 (9th Cir. 2002)	7, 11
16	<i>Geico Casualty Co. v. Beauford,</i>	
17	No. 8:05-CV-697-T-24EAJ, 2006 WL 2990454 (M.D. Fla. Oct. 19, 2006)	13
18	<i>G-K Props. v. Redevelopment Agency of San Jose,</i>	
19	577 F.2d 645 (9th Cir. 1978)	8, 11
20	<i>Henry v. Gill Indus., Inc.,</i>	
21	983 F.2d 943 (9th Cir. 1993)	8
22	<i>Herman & MacLean v. Huddleston,</i>	
23	459 U.S. 375 (1983).....	8
24	<i>Hernandez v. City of El Monte,</i>	
25	138 F.3d 393 (9th Cir. 1998)	11
26	<i>In re Livent, Inc. Noteholders Sec. Litig.,</i>	
27	355 F. Supp. 2d 722	9
28	<i>In re Napster, Inc. Copyright Litig.,</i>	
	462 F. Supp. 2d 1060 (N.D. Cal. 2006)	9
	<i>In re Prestige Brands Holding, Inc.,</i>	
	No. 05 CV 06924(CLB), 2006 WL 2147719 (S.D.N.Y. July 10, 2006)	9
	<i>Leon v. IDX Sys. Corp.,</i>	
	464 F.3d 951 (9th Cir. 2006)	6, 8, 10, 12

1	<i>Lewis v. Telephone Empl. Credit Union,</i>	
2	87 F.3d 1537 (9th Cir. 1996)	10
3	<i>Malone v. U.S. Postal Service,</i>	
4	833 F.2d 128 (9th Cir. 1987)	11
5	<i>Myron v. Terhune,</i>	
6	No. C 99-21265 JW (PR), 2008 WL 4891046 (N.D. Cal. Nov. 12, 2008).....	15
7	<i>N. Am. Watch Corp. v. Princess Ermine Jewels,</i>	
8	786 F.2d 1447 (9th Cir. 1986)	8, 12
9	<i>Navellier v. Sletten,</i>	
10	262 F.3d 923 (9th Cir. 2001)	9
11	<i>Payne v. Exxon Corp.,</i>	
12	121 F.3d 503 (9th Cir. 1997)	7, 11
13	<i>RIO Props., Inc. v. Rio Int'l Interlink,</i>	
14	284 F.3d 1007 (9th Cir. 2002)	8
15	<i>Shepherd v. Am. Broadcasting Cos., Inc.,</i>	
16	62 F.3d 1469 (D.C. Cir. 1995)	7
17	<i>So v. Land Base, LLC,</i>	
18	No. CV 08-03336 DDP (AGRx), 2009 WL 2407954 (C.D. Cal. Aug. 4, 2009).....	15
19	<i>Toth v. Trans World Airlines,</i>	
20	862 F.2d 1381 (9th Cir. 1988)	8
21	<i>U.S. ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., Inc.,</i>	
22	857 F.2d 600 (9th Cir. 1988)	8
23	<i>Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.,</i>	
24	982 F.2d 363 (9th Cir. 1992)	10, 11
25	<i>Update Art, Inc. v. Modlin Pub., Ltd.,</i>	
26	843 F.2d 67 (9th Cir. 1988)	8
27	<i>Wanderer v. Johnson,</i>	
28	910 F.2d 652 (9th Cir. 1990)	8
	<i>Welch v. Eli Lilley & Co.,</i>	
	No. 1:06-cv-0641-RLY-JMS, 2009 WL 700199 (S.D. Ind. Mar. 16, 2009)	13
	<i>William T. Thompson Co. v. Gen. Nutrition Corp.,</i>	
	593 F.Supp. 1443 (C.D.Cal.1984)	9
	<i>Wyle v. R.J. Reynolds Indus., Inc.,</i>	
	709 F.2d 585 (9th Cir. 1983)	9

1
2
3
4
5
6
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14
15
16
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24
25
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27
28

RULES

Civ. L. R. 37-1(a) 15

Fed. R. Civ. P. 37 15

Fed. R. Civ. P. 37(a)(1)..... 15

Fed. R. Civ. P. 37(b) 7

TREATISES

7-37 Moore’s Federal Practice (Civil), § 37.51 9

I. INTRODUCTION

Based on a record that is completely devoid of any discovery misconduct by Ernst & Young LLP (“EY”), Plaintiffs’ Motion for Sanctions (the “Motion”) seeks some of the most drastic discovery sanctions possible – up to and including an issue preclusion order that is tantamount to a terminating sanction against EY. Plaintiffs seek these draconian sanctions even though they do not claim that EY violated any discovery orders. In fact, Plaintiffs never even moved to compel any document production from EY. Nor do Plaintiffs claim that EY has improperly withheld anything from discovery. Indeed, EY has produced about 2.4 million pages of documents to Plaintiffs. Plaintiffs’ only complaint is that EY produced approximately 8,300 documents to them in November 2009 – too close (in Plaintiffs’ view) to the discovery cutoff. As Plaintiffs acknowledge, EY never told Plaintiffs, before November, that its production was complete. In fact, EY repeatedly told Plaintiffs that it was not. Specifically, EY told Plaintiffs that it would be producing additional documents, but that the production would take substantial time to complete due to the scope of Plaintiffs’ requests and the fact that counsel for Juniper’s Audit Committee, which asserted attorney-client privilege and/or work product protection over certain documents in EY’s possession, was conducting a separate privilege review. Simply put, EY has not engaged in any discovery misconduct.

Nor have Plaintiffs suffered any prejudice from EY’s production of documents in November. Plaintiffs’ repeated reference to 650,000 pages of documents from that production is misleading. The vast majority of these are multiple copies of massive spreadsheets provided to EY by Juniper, many, many pages of which are actually blank. Just 310 or so of the documents make up over 580,000 of those pages. Many other documents from the November production are simply duplicate copies of documents that EY produced to Plaintiffs nearly a year ago. Tellingly, Plaintiffs’ motion does not identify a single document from EY’s November production, much less explain how the timing of EY’s production of any particular document has prejudiced Plaintiffs’ ability to prepare their case. Plaintiffs’ repeated reference to the December 1, 2009 discovery cutoff is likewise misleading, as both Juniper and EY previously agreed to allow Plaintiffs to depose numerous witnesses after December 1, and those depositions are

moving forward. The manifest lack of any prejudice precludes the award of any sanctions at all, much less the draconian sanctions Plaintiffs seek. Plaintiffs' Motion should be denied.

II. FACTUAL BACKGROUND

In May 2006, certain published reports suggested that Juniper (as well as several other companies) may have backdated stock options to its directors and officers. Compl. ¶ 14. EY, Juniper's outside auditor, began looking into the matter immediately. Declaration of Andrew M. Farthing ("Farthing Decl.") Ex. 1. As part of that inquiry, EY retrieved archived workpapers relating to its past audit work for Juniper. *Id.* At the time, EY was unable to locate the workpapers relating to the Juniper audit for the year 2000. *Id.* EY immediately began an exhaustive search for the missing 2000 workpapers. On May 30, 2006, approximately one week after EY's search commenced, EY received a request from the SEC to preserve documents relating to EY's audits of Juniper. Farthing Decl. Ex. 2. One and half months later, on July 14, 2006, Plaintiffs filed this action naming only Juniper and some of its current and former officers and directors as defendants. As all of these events unfolded, EY continued, unsuccessfully, to search for the 2000 workpapers. Declaration of Paul Koreneff ("Koreneff Decl.") Ex. A at 45:2-10, 46:22-47:25, 50:24-51:17.

Plaintiffs did not name EY as a defendant in this action until January 17, 2007. At that time, Plaintiff asserted a single claim for relief against EY, and that claim remains the only cause of action asserted against EY. Specifically, Plaintiffs claim that EY violated Section 11 of the Securities Act of 1933 in connection with a Registration Statement filed by Juniper as part of its April 2004 acquisition of a company called NetScreen Technologies, Inc. (the "NetScreen Registration Statement"). *See* Compl. ¶¶ 364-73. The NetScreen Registration Statement incorporated Juniper's 2003 audited financial statements by reference from Juniper's 2003 Form 10-K, and EY consented to the inclusion of its 2003 audit opinion for Juniper in the NetScreen Registration Statement. *Id.* at ¶ 368; Farthing Decl. Ex. 3 at 81 and Exhibit 23.3. For SEC reporting purposes, Juniper's 2003 Form 10-K, and thus EY's audit opinion, covered some of Juniper's financial statements for the years 2001 and 2002, in addition to 2003, but none from 2000 or prior years. Farthing Decl. Ex. 4. Discovery in this action began after Judge Ware

1 approved the parties' discovery plan in an order dated November 17, 2008. Dkt. 179.¹ Plaintiffs
 2 propounded their first set of discovery requests on EY on November 11, 2008. Farthing Decl.
 3 Ex. 6. On December 11, 2008, EY served its objections and responses to Plaintiffs' request.
 4 Farthing Decl. Ex. 7. The next day, EY produced to Plaintiffs all documents that EY had
 5 previously produced to the SEC in response to a request for all documents related to options at
 6 Juniper from 1999 to 2006. Farthing Decl. Ex. 8.² This production included portions of the
 7 audit workpapers related to stock options for the years 1999 (after the Company went public)
 8 through 2005, interim stock option testing documents for certain quarters in the fiscal year 2006,
 9 and "desk files" from 1999-2006.³ *Id.* EY produced additional documents to Plaintiffs on
 10 January 9, 2009, by which time EY had produced to Plaintiffs the vast majority of the documents
 11 relevant to their sole claim against EY. These documents included the full set of audit
 12 workpapers for years 2001 to 2003—the only years covered by the audited financial statements
 13 incorporated into the NetScreen Registration Statement. Farthing Decl. Ex. 9. EY's production
 14 to Plaintiffs during the first two months of discovery in this case was massive: As of January 9,
 15 2009, EY had produced to Plaintiffs more than 1.2 million pages of documents. Farthing Decl.
 16 Ex. 10.

17 In April 2009, EY produced another 142,000 pages of documents to Plaintiffs,
 18 including documents relating to its audit of Juniper's restated financial statements, tax provision
 19 workpapers from 2001-2003 and 2005, and NetScreen-related workpapers. Farthing Decl. Exs.
 20 10-11. At that time, EY informed Plaintiffs' counsel that EY would be producing additional
 21 desk files to Plaintiffs (even though EY believed the desk files were not likely relevant to
 22 Plaintiffs' claims), but that EY's production of those documents would have to await not only

24 ¹ Even before Judge Ware's order, in August 2008, EY provided Plaintiffs with the audit
 25 workpapers for the years 2001, 2002, and 2003 that related to stock options to prepare for a
 mediation. Farthing Decl. Ex. 5.

26 ² The statement in Plaintiffs' brief that EY's first production to Plaintiffs was not made until
 January 2009, Mot. at 2, is erroneous.

27 ³ "Desk files" are all documents that are not part of EY's workpapers, including documents such
 28 as e-mails and other documents that are maintained in files or on the computers of EY personnel.

1 EY's privilege and work product review, but also a separate review by counsel for Juniper's
 2 Audit Committee.⁴ Farthing Decl. Ex. 10. Although EY made clear that its production was not
 3 yet complete, Plaintiffs' counsel did not, at that time, ask for a date certain by which EY's
 4 production would be complete, nor did Plaintiffs seek an order compelling EY to produce
 5 documents or complete its production by a date certain.

6 On September 1, 2009, following review by the Audit Committee's counsel, EY
 7 produced an additional 447,103 pages of documents to Plaintiffs. Farthing Decl. Ex. 14. These
 8 documents included emails and other desk files related to EY's audit of Juniper's restated
 9 financial statements or otherwise related to stock options, which were created after EY's
 10 production to the SEC (and thus would not have been included in EY's December 2008
 11 production to Plaintiffs). Farthing Decl. Exs. 14-15. By September 1, 2009, EY had produced
 12 approximately 1.8 million pages to Plaintiffs. Farthing Decl. Ex. 16.

13 On September 4, 2009, counsel for EY informed Plaintiffs' counsel that EY
 14 would be producing additional documents to Plaintiffs following a privilege review by counsel
 15 for Juniper's Audit Committee. Farthing Decl. Exs. 15-16 ("As recently as last week, we
 16 indicated that although EY's review was complete, Juniper was still reviewing the remaining
 17 documents for applicable privilege...."). On September 16, 2009, counsel for EY again
 18 informed Plaintiffs that EY would be producing additional documents. EY's counsel explained
 19 that while EY had finished its document review, counsel for Juniper's Audit Committee was still
 20 reviewing these documents for privilege and/or work product, and that EY would produce the

21
 22
 23 ⁴ As the Court is aware, Juniper's Audit Committee has asserted attorney-client privilege and
 24 work product protection over certain documents and information relating to its investigation of
 25 stock option practices at Juniper, including documents and information possessed by EY. EY
 26 has not taken any position on the Audit Committee's privilege and work product assertions, but
 27 the Audit Committee has directed EY to allow its counsel to review EY's files and remove or
 28 redact information that the Committee believes is privileged or work product before producing
 such documents to Plaintiffs. EY has provided Plaintiffs with privilege logs identifying
 documents withheld from production based on EY's assertions of privilege and work product
 protection, while Juniper's Audit Committee has provided Plaintiffs with separate privilege logs
 identifying documents and information withheld by the Committee. Farthing Decl. Exs. 12-13.

documents as soon as that review was complete.⁵ Farthing Decl. Exs. 16-17. EY's counsel also made clear that EY would not oppose an extension of the fact discovery cut-off. Farthing Decl. ¶ 19. Although EY was clear in its September 16, 2009 letter that its production was not complete, Plaintiffs' did not seek an order compelling EY to produce the additional documents or complete its production by a date certain.

Following the privilege and work product review by counsel for Juniper's Audit Committee, EY produced the final batch of desk files and emails on November 2, 2009. Farthing Decl. Ex. 18. The November 2 production, although comprising approximately 670,000 pages, contained only about 8,300 documents. Koreneff Decl. ¶ 3. Approximately 310 of those documents comprise the vast majority (more than 580,000) of the pages contained in this production. *Id.* These 310 or so documents consist primarily of spreadsheets provided to EY by Juniper in connection with stock compensation expense calculations in 2006 and 2007 under FAS 123(R) (an issue that is not relevant to Juniper's restatement of financial results at issue in this case). *Id.* Many of these spreadsheet pages, moreover, are blank sheets that were printed out due to formatting issues. *Id.* Plaintiffs' complaint about receiving 670,000 pages of documents in November, in other words, vastly overstates the amount of information Plaintiffs received as part of this production.

Of the information Plaintiffs did receive in November 2009, moreover, much of it is either totally irrelevant to Plaintiffs' Section 11 claim against EY, or simply duplicates documents previously produced to Plaintiffs. In fact, the vast majority of documents in the November production were created *after* EY first collected documents for production to the SEC in mid-2006 – that is, long after the events that gave rise to Juniper's restatement. Koreneff Decl. ¶ 4. To the extent that the November production includes documents created before mid-2006, they are simply duplicates of earlier workpapers – all of which had been produced to

⁵ In its September 16, 2009 letter, counsel for EY stated that it had expected to complete its production by the end of the month. However, counsel for Juniper's Audit Committee did not complete its review when expected, and as a result, the remaining 8,300 documents were not produced until November 2, 2009. At no time from September 16, 2009 until October 20, 2009 did Plaintiffs ask whether EY's production was complete.

1 Plaintiffs by January 2009 – that had been copied as part of EY’s audit of Juniper’s restated
 2 financial statements.⁶ *Id.*

3 Although the November 2009 production was largely irrelevant and/or duplicative
 4 of previously produced documents, EY has agreed to produce several of its witnesses after the
 5 December 1, 2009 discovery cut-off.⁷ In fact, since December 1, Plaintiffs have deposed three
 6 EY witnesses (Lisa Schwartz, Brad Feller and Amanda Powell), have one more on calendar for
 7 January 6, 2010, and one more will be scheduled in the future if and when the witness’ medical
 8 condition permits. Farthing Decl. ¶ 22. In addition, purportedly to allow Plaintiffs to depose
 9 Juniper witnesses about information in EY’s November 2009 production, Plaintiffs and Juniper
 10 entered into a stipulation allowing Plaintiffs to take depositions of Juniper personnel after the
 11 December 1, 2009 cutoff. Dkt. 437.⁸ Plaintiffs and Juniper also agreed to adjourn the February
 12 1, 2010 due date for opening expert reports. *Id.* On December 18, 2009, the Court granted in
 13 part Plaintiffs’ motion to take additional depositions and also granted Plaintiffs’ and the Juniper
 14 defendants stipulated and proposed order allowing Plaintiffs to take depositions of Juniper
 15 defendants after the December 1, 2009 cutoff. Dks. 474, 476.

16 **III. ARGUMENT**

17 There are two sources of authority a district court can use to sanction a party for
 18 discovery abuses: “the inherent power of federal courts to levy sanctions in response to abusive
 19 litigation practices, and the availability of sanctions under Rule 37 against a party who fails to
 20 obey an order to provide or permit discovery.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th

21
 22 ⁶ Some of the documents included in the November 2009 production also relate to the audit of
 23 Juniper’s 2007 financial statements, which are not relevant to any of Plaintiffs’ claims. Those
 documents were mistakenly included in EY’s document production.

24 ⁷ EY agreed to produce a few of its witnesses in December 2009 because counsel for Ms. Berry
 25 in the related litigation was not available in October and November, when the depositions were
 originally scheduled. Farthing Decl. ¶ 21.

26 ⁸ Despite this agreement, Plaintiffs have used very little information from the November 2009
 27 production at deposition. Of the 355 exhibits used at depositions taken by Plaintiffs since the
 November 2009 production was made, just two are documents produced for the first time in
 28 November 2009. Farthing Decl. ¶ 25. Both documents were created in December 2006 and
 relate to EY’s audit of Juniper’s restated financial statements. *Id.*

1 Cir. 2006) (internal quotations and citations omitted). Plaintiffs here purport to rely upon both,
 2 but for the reasons discussed below, neither Rule 37 nor this Court's inherent authority supports
 3 any sanctions at all against EY, much less the severe sanctions Plaintiffs seek in their motion.

4 **A. Because EY Did Not Violate Any Discovery Orders, Fed. R. Civ. P. 37, And**
 5 **Cases Imposing Sanctions for Violations of Court Orders, Are Irrelevant**

6 Plaintiffs' motion cites Rule 37, as well as a host of cases imposing sanctions for
 7 violations of discovery orders, as authority for the draconian sanctions they seek here. But
 8 sanctions under Rule 37 are only available for failure to comply with a court order. Fed. R. Civ.
 9 P. 37(b); *Shepherd v. Am. Broadcasting Cos., Inc.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) ("Rule
 10 37(b) therefore cannot support the sanctions before us today" because no court order compelling
 11 discovery was made.). Here, EY did not violate any Court orders regarding discovery. Indeed,
 12 Plaintiffs never even moved for such an order.

13 For this reason alone, Rule 37 and the numerous cases cited by Plaintiffs that
 14 impose sanctions for violations of court orders (and often violations of *multiple* orders) are
 15 completely inapposite here. Indeed, if anything, the very stark contrast between these cases and
 16 the facts presently before the Court makes clear that there is no basis for sanctions here. *See*
 17 Mot. at 5-8 & nn. 4-6, citing *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)
 18 (sanction of default appropriate against litigant that "repeatedly flouted even his basic discovery
 19 obligations, often violating court orders" and "misrepresented to both counsel and to the district
 20 court that the documents did not exist"); *Payne v. Exxon Corp.*, 121 F.3d 503, 505 (9th Cir.
 21 1997) (sanctions appropriate against party that had violated three different orders compelling
 22 discovery); *CFTC v. Noble Metals, Int'l*, 67 F.3d 766, 771 (9th Cir. 1995) (sanctions appropriate
 23 against litigants that "willfully violated the court's orders"), *cert. denied*, 519 U.S. 815 (1996);
 24 *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 341-44 (9th Cir. 1995)
 25 (sanctions appropriate against party that violated gag order and lied about destruction of
 26 documents in response to court order compelling their production, where documents were
 27 discovered to still exist after first trial was completed); *Adriana Int'l Corp. v. Lewis & Co.*, 913
 28 F.2d 1406, 1409-10 (9th Cir. 1990) (sanctions appropriate against party that had violated eight

1 court orders); *Wanderer v. Johnson*, 910 F.2d 652, 654, 656 (9th Cir. 1990) (sanctions
 2 appropriate where court issued “at least nine orders compelling production of documents,” with
 3 which the sanctioned party repeatedly failed to comply).⁹

4 **B. Issue Preclusion Sanctions Under the Court’s Inherent Authority Are**
 5 **Likewise Inappropriate**

6 In determining whether to award issue preclusion or other sanctions for discovery
 7 misconduct, courts typically consider five factors: “(1) the public’s interest in expeditious
 8 resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice to the
 9 party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and
 10 (5) the availability of less drastic sanctions.” *Leon*, 464 F.3d at 958 (quoting *Anheuser-Busch,*
 11 *Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)).

12 In this case, Plaintiffs’ request for an order precluding EY from asserting its
 13 affirmative defenses of good faith, due diligence, and reasonable investigation (Mot. at 1) would
 14 essentially strip EY of its ability to defend itself. *See, e.g., Herman & MacLean v. Huddleston,*
 15 459 U.S. 375, 381-82 (1983); *In re Prestige Brands Holding, Inc.*, No. 05 CV 06924(CLB), 2006

16 ⁹ *See also* Mot. at 6-8 & nn.4-6, *citing RIO Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007,
 17 1022 (9th Cir. 2002) (award of sanctions affirmed for violation of order compelling discovery
 18 when combined with wrongful evasion of service of process in order to punish “impudent
 19 international defendant”); *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 947-49 (9th Cir. 1993)
 20 (sanction of dismissal appropriate against litigant who wrongfully failed to appear for deposition
 21 twice, failed to produce documents, failed to pay monetary sanctions ordered by the trial court,
 22 and as a result of litigant’s delay, only other individual who participated in the conversations that
 23 formed the subject of the lawsuit passed away without having his deposition taken); *Toth v.*
 24 *Trans World Airlines*, 862 F.2d 1381, 1384-85 (9th Cir. 1988) (sanctions appropriate against
 25 party that failed to comply with multiple court orders, despite two extensions of time in which to
 26 comply); *Update Art, Inc. v. Modlin Pub., Ltd.*, 843 F.2d 67, 70 (9th Cir. 1988) (sanctions
 27 appropriate after “innumerable discovery conferences resulting in a series of court orders
 28 compelling appellants to respond to discovery requests” when appellants “repeatedly failed to
 comply with the discovery orders, despite numerous extensions of time to respond”); *N. Am.*
Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447, 1449 (9th Cir. 1986) (affirming sanction
 of dismissal for failure to comply with order compelling production of documents and falsely
 representing to the court in a sworn affidavit that the documents were not in litigant’s
 possession); *G-K Props. v. Redevelopment Agency of San Jose*, 577 F.2d 645, 647 (9th Cir.
 1978) (sanctions appropriate when party refused to produce documents as required by three court
 orders); *cf. U.S. ex rel. Wiltec Guam, Inc. v. Kahalu Constr. Co., Inc.*, 857 F.2d 600, 601-04
 (9th Cir. 1988) (district court abused its discretion by entering an order of issue preclusion
 despite litigant’s failure to appear for deposition, violation of pretrial scheduling order, and
 violation of order compelling production of documents).

WL 2147719, at *9 (S.D.N.Y. July 10, 2006); *In re Livent, Inc. Noteholders Sec. Litig.*, 355 F. Supp. 2d 722, 723-24. Thus, the requested relief is tantamount to a default sanction against EY. Given the severity of the relief they have requested, Plaintiffs must meet the even higher standards applicable to a request for sanction of dismissal or default. *See, e.g.*, 7-37 MOORE'S FEDERAL PRACTICE (Civil), § 37.51 ("If deeming certain facts established is tantamount to disposing of claims, appellate courts require the same justification that is required for a dismissal or default sanction."); *see also Noble Metals*, 67 F.3d at 770-72 (allowing such sanctions only in "extreme circumstances" where there has been willfulness or bad faith).

In that regard, default or terminating sanctions are warranted only if the sanctioned party's abuses "eclipse entirely the possibility of a just result." *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1071 (N.D. Cal. 2006) (terminating sanctions warranted only if the sanctioned party's abuses "eclipse entirely the possibility of a just result"); *William T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F.Supp. 1443, 1456 (C.D.Cal.1984) (holding that default was proper because of party's "willful destruction of documents and records that deprived [the opposing party] of the opportunity to present critical evidence on its key claims to the jury").¹⁰ Thus, a finding of willfulness, fault or bad faith is required. *Anheuser-Busch*, 69 F.3d at 348 (issue preclusion sanctions that have the effect of a default are warranted only when "a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings.") (internal quotations and citations omitted). As discussed below, Plaintiffs do not come close to meeting this stringent standard here.

1. Plaintiffs Have Shown No Misconduct at All

As a threshold matter, Plaintiffs have failed to show that EY has even engaged in any discovery misconduct at all. EY has produced millions of pages of documents in response to

¹⁰ Indeed, when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case, issue preclusion sanctions are a violation of due process. *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir. 1983); *see Navellier v. Sletten*, 262 F.3d 923, 947 (9th Cir. 2001) (party requesting sanction must show that issue preclusion order "bears a reasonable relationship to the subject of discovery that was frustrated by sanctionable conduct").

1 Plaintiffs' request. Although EY's production occurred on a rolling basis over many months, EY
 2 repeatedly informed Plaintiffs that its production was not yet complete. Having failed to show
 3 that EY engaged in any discovery misconduct at all, Plaintiffs cannot make even this threshold
 4 showing for discovery sanctions.

5 **2. Plaintiffs Have Suffered No Prejudice**

6 Where discovery misconduct has been shown, the key factor to be considered is
 7 the risk of prejudice to the party seeking sanctions. *Leon*, 464 F.3d at 958; *Unigard*, 982 F.2d at
 8 368 (9th Cir. 1992) (holding that evidence preclusion is appropriate only if allowing the evidence
 9 "would unfairly prejudice an opposing party"); *Lewis v. Telephone Empl. Credit Union*, 87 F.3d
 10 1537, 1558 (9th Cir. 1996) (sanctions must be "carefully fashioned" and may not "unduly
 11 interfere[] with [a party's] ability to produce relevant evidence.").

12 Here, Plaintiffs have offered no evidence of any prejudice. Although they
 13 complain that they have already taken several depositions without the benefit of EY's November
 14 2009 production (Mot. at 7-9), Plaintiffs have made no showing that any of the documents
 15 produced by EY in November have anything to do with any of those witnesses, or that they were
 16 not already available to Plaintiffs through previous productions by EY or Juniper. Indeed,
 17 Plaintiffs' motion does not even discuss the *content* of EY's November production. In fact, as
 18 discussed above, EY's November production consists of documents that are either largely
 19 irrelevant or duplicative of documents previously produced by EY. Having made no showing at
 20 all about the content of EY's production, Plaintiffs cannot possibly show sufficient prejudice to
 21 warrant the drastic sanctions they seek.

22 Nor is there any basis for Plaintiffs to complain about their ability to prepare for
 23 future witnesses. Plaintiffs' Motion complains repeatedly about receiving documents
 24 approximately one month before the December 1, 2009 discovery cutoff, but Plaintiffs fail to
 25 mention that both EY and Juniper have already agreed to allow Plaintiffs to depose both current
 26 and former personnel after the December 1 discovery cutoff. Indeed, Plaintiffs only deposed one
 27 EY witness (other than a 30(b)(6) witness regarding the 2000 workpapers) before the December
 28 1 cutoff. EY has produced or will produce at least four witnesses after the December 1 cutoff,

1 including one witness who will be produced on January 6, 2010. Farthing Decl. ¶ 22. Plaintiffs
 2 have had ample opportunity to review the November production before proceeding with those
 3 depositions.

4 Indeed, the cases cited by Plaintiffs demonstrate the difference between cases
 5 where prejudice has occurred and the lack thereof in this case. For example, Plaintiffs rely on
 6 *Adriana* (Mot. at 5, 7), which held that “[d]elay alone has been held to be insufficient prejudice.”
 7 913 F.3d at 1411-12. But the court in *Adriana* awarded sanctions based on Adriana’s “repeated
 8 failure to appear at scheduled depositions” on six separate occasions, and “continuing refusal to
 9 comply with court-ordered production of documents” despite multiple court orders. *Id.* EY’s
 10 production of about 8,300 largely irrelevant and duplicative documents a few weeks before the
 11 discovery cut-off (and many weeks before Plaintiffs actually deposed most EY witnesses) does
 12 not come close.

13 Nor does this case resemble *Anheuser-Busch*, on which Plaintiffs also rely. Mot.
 14 at 7-8 & n.6. In *Anheuser-Busch*, the defendants falsely told the court and opposing counsel that
 15 key documents ordered to be produced by the court had been destroyed in a fire, when in fact
 16 they still existed, and their existence did not come to light until after a trial had occurred. 69
 17 F.3d at 342-43. In *G-K Properties*, another case cited by Plaintiffs (Mot. at 6-7), the court found
 18 prejudice because it had to delay the trial date after plaintiffs failed to comply with two orders
 19 compelling production. 577 F.2d at 647. And in *Payne* (cited at Mot. at 5-6, 8), the court found
 20 prejudice where plaintiffs tendered discovery responses near to or after the close of discovery,
 21 and only after multiple orders compelling production. 121 F.3d at 505, 508.¹¹ Plaintiffs here
 22 have not shown, and cannot show, prejudice of any kind, much less the type of prejudice that
 23 supported sanctions in cases like *Adriana*, *Anheuser-Busch*, *G-K Properties*, and *Payne*. See
 24 also *Fair Housing of Marin*, 285 F.3d at 905 (finding prejudice where defendant “misrepresented

25
 26 ¹¹ The other cases cited in Plaintiffs’ Motion are completely inapposite, imposing sanctions for
 27 such behavior as judge shopping, blatant spoliation and failure to comply with a pretrial
 28 disclosure order. See Mot. at 5, 8 n.5, citing *Hernandez v. City of El Monte*, 138 F.3d 393, 400
 (9th Cir. 1998); *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 365, 368-
 69 (9th Cir. 1992); *Malone v. U.S. Postal Service*, 833 F.2d 128, 129 (9th Cir. 1987).

to both counsel and to the district court that the documents did not exist); *N. Am. Watch Corp.*, 786 F.2d at 1449, 1451 (finding prejudice where defendants “falsely represented to the court by way of affidavit that they did not have” control over the requested documents, and only produced them the day before a deposition and despite the “imminence of the trial date”).

3. The Availability of Less Drastic Sanctions Weighs Heavily Against Plaintiffs’ Motion

Another important factor weighing against Plaintiffs’ request for issue preclusion sanctions is the availability of lesser sanctions. *Leon*, 464 F.3d at 958. Because Plaintiffs have shown no prejudice – and, indeed, no discovery misconduct by EY at all – no sanctions of any kind are appropriate. But even if Plaintiffs had suffered prejudice from, for example, having deposed several witnesses without the benefit of key documents, such prejudice could be cured with sanctions far short of what Plaintiffs seek here. Indeed, Plaintiffs have requested such lesser sanctions in their motion by requesting relief from the discovery cutoff and an order allowing them to recall witnesses. Mot. at 1, 9. Even these lesser sanctions are unnecessary: both EY and Juniper previously agreed to allow Plaintiffs to take depositions after the December 1 cut-off, so Plaintiffs will have ample opportunity to question witnesses about the documents in EY’s November production. Farthing Decl. ¶ 22.

Moreover, because Plaintiffs had virtually all of the relevant EY documents by January 2009, it is highly unlikely that Plaintiffs will be able to show a *bona fide* need for additional time with any of the witnesses they have already deposed. But in the unlikely event that Plaintiffs were to make such a showing, EY is willing to meet and confer with Plaintiffs to discuss additional deposition time with such witnesses.

4. The Remaining Factors Weigh Against Sanctions

Another factor to be considered is the public’s interest in expeditious resolution of litigation. *Leon*, 464 F.3d at 958. This factor, to the extent it is even implicated here, weighs against sanctions. First, a trial date in this case has not yet been set, and therefore it has not been

1 delayed by EY's production of documents in November.¹² Second, as set forth above, Plaintiffs
 2 have been in possession of the key EY documents, including all audit workpapers related to the
 3 claim against EY, since early January 2009. Farthing Decl. Exs. 8-9. Third, the November
 4 production was largely duplicative of documents produced before, but from other custodians.
 5 Koreneff Decl. ¶ 4. Finally, it should go without saying that the public policy favoring
 6 disposition of cases on their merits weighs heavily in favor of EY and against an award of
 7 sanctions that would essentially strip EY of its ability to defend the lack of merit of Plaintiffs'
 8 allegations.

9 **C. Plaintiffs' Request For An Order Precluding EY From Asserting The**
 10 **Attorney-Client Privilege Or Work Product Protection Is Unwarranted**

11 Plaintiffs also request an order precluding EY from asserting the attorney-client
 12 privilege or work product protection. This request, for which Plaintiffs do not cite any legal or
 13 factual basis, is completely unwarranted. "The waiver of the attorney-client privilege is an
 14 extreme sanction and is reserved for cases of unjustifiable delay, inexcusable conduct or bad
 15 faith." *Geico Casualty Co. v. Beauford*, No. 8:05-CV-697-T-24EAJ, 2006 WL 2990454, at *1
 16 (M.D. Fla. Oct. 19, 2006); *Welch v. Eli Lilly & Co.*, No. 1:06-cv-0641-RLY-JMS, 2009 WL
 17 700199, at *14 (S.D. Ind. Mar. 16, 2009) ("Finding a waiver of the attorney-client privilege is a
 18 serious sanction."). Plaintiffs make no attempt to demonstrate why they believe they are entitled
 19 to this very rare form of relief, or even what EY's November production has to do with EY's
 20 assertion of the attorney-client privilege or work product protection. EY has produced a
 21 privilege log to Plaintiffs (Farthing Decl. Ex. 12), and Plaintiffs have not challenged a single
 22 entry on that log. Under the circumstances, Plaintiffs' request for an order stripping EY of the
 23 attorney-client privilege and work product protection in this case is meritless.

24
 25
 26 ¹² For the same reason, the factor relating to the Court's need to manage its dockets also weighs
 27 in EY's favor and against sanctions. In addition, this factor further weighs in favor of EY
 28 because it is Plaintiffs that have cluttered the Court's docket by improperly filing this motion for
 sanctions without first moving to compel, or even meeting and conferring before filing this
 motion. Farthing Decl. ¶ 23.

D. Plaintiffs' Request For Further Relief Is Unwarranted And Unnecessary

Finally, Plaintiffs' request for further relief in the form of relief from the discovery cutoff and the ability to recall witnesses should also be denied. Both EY and the Juniper defendants have allowed depositions to occur after the fact discovery cutoff. Farthing Decl. 22; Dkt. 437. Plaintiffs have made no showing as to why particular witnesses would need to be recalled to testify on topics raised for the first time in the November production, but to the extent they could make such a showing, the proper method of addressing that would be for the parties to meet and confer, and then seek Court involvement only if necessary. Sanctions are unwarranted and unnecessary.

E. Plaintiffs' Insinuations of Spoliation Are Meritless

Plaintiffs' Motion suggests that EY concealed from Plaintiffs that certain workpapers for 1999 and 2000 had not been produced, that the 2000 workpapers are missing, and that this purported misconduct justifies issue preclusion sanctions. Mot. at 3, 7. Plaintiffs are wrong on all accounts. Far from being missing or hidden, the 1999 workpapers relating to audits after Juniper's initial public offering¹³ have been produced. Farthing Decl. Ex. 20.¹⁴ In addition, all 2000 workpapers that EY has been able to locate have also been produced. *Id.* Although EY has been unable to locate the bulk of the 2000 workpapers despite repeated and exhaustive searches, there can be no legitimate argument that those documents were spoliated because the record shows that they were missing before EY was placed on notice that they were potentially relevant to litigation. *See Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991).

¹³ EY has not produced documents relating to audits performed before Juniper's initial public offering because they are irrelevant to this action. *See* Farthing Decl. Ex. 20. Plaintiffs have never moved to compel production of those documents.

¹⁴ EY's production is bates-numbered in such a way as to permit easy identification of the year's audit to which they relate. For example, the 2000 workpapers are marked as EY 00 000001-000036, and the 2001 workpapers are marked EY 01 000001-000878 (produced on December 15, 2008) and EY-JNPR-WP-01-000001-002383 (produced on January 9, 2009). *See* Farthing Decl. Exs. 8-9.

F. Plaintiffs' Motion Should Be Denied Because They Did Not Meet And Confer

Plaintiffs did not meet and confer with EY before filing the Motion. Farthing Decl. ¶ 23; *see also id.* at Ex. 19. Local Rule 37-1(a) provides that "The Court will not entertain a request or a motion to resolve a disclosure or discovery dispute unless, pursuant to FRCP 37, counsel have previously conferred for the purpose of attempting to resolve all disputed issues." Civ. L. R. 37-1(a). Accordingly, Plaintiffs' motion should be summarily denied on this basis alone. *See Doe v. City of San Mateo*, No. C 07-05596 SI, 2009 WL 1636142, at *1 (N.D. Cal. June 8, 2009); *Myron v. Terhune*, No. C 99-21265 JW (PR), 2008 WL 4891046, at *1 (N.D. Cal. Nov. 12, 2008); *accord So v. Land Base, LLC*, No. CV 08-03336 DDP (AGRx), 2009 WL 2407954, at *2 (C.D. Cal. Aug. 4, 2009) (same result applying the Central District's local rules); *see also* Fed. R. Civ. P. 37(a)(1) (requiring a motion to compel to "include a certification that the movant has in good faith conferred with the person or party failing to make disclosure or discovery in an effort to obtain it without court action").

IV. CONCLUSION

For the foregoing reasons, EY respectfully requests that Plaintiffs' motion be denied.

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